

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-6751-99
RLPeacock

date:

to: Chief, Examination Division, Manhattan
Attn: Revenue Agent Carl Perrera

from: District Counsel, Manhattan (CC:NER:MAN)

subject:

Form SS-10 (Tax Years [REDACTED] through [REDACTED])
Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-00
6501.08-10
6501.08-17

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INTRODUCTION

This memorandum is in response to your request for advice in the above-captioned matter. Specifically, you have asked our office to review a Form SS-10 (Consent to Extend the Time to Assess Income Taxes) executed on behalf of [REDACTED] [REDACTED], for the taxable years [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. The Form SS-10 in question extends the statute of limitations on assessment through [REDACTED].

The advice given below is subject to post review by the Chief Counsel's national office. Therefore, we ask that you wait ten working days from the date of this memorandum, or until you earlier hear of approval, before acting on this advice.

ISSUES

1. Which entity is the proper entity to execute a Form SS-10 for [REDACTED], for the pre-merger tax years?
2. What specific language should be used on the Form SS-10 for [REDACTED], for the pre-merger tax years?
3. What specific language should be used on the Revenue Agent Report and the Closing Agreement?

FACTS

[REDACTED] (" [REDACTED] ") (E.I.N. [REDACTED]), is a New York corporation. The Manhattan District is presently conducting an examination of [REDACTED] employment tax liability for the taxable years ending December 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED]. During these years, [REDACTED] was a subsidiary of [REDACTED], (" [REDACTED] "), and was included on the consolidated U.S. Corporate Income Tax Returns (Forms 1120) of [REDACTED]. [REDACTED] is not currently under audit.

[REDACTED] (" [REDACTED] ") (E.I.N. [REDACTED]), is a Delaware corporation. On [REDACTED], [REDACTED], and several other corporations, entered into a Plan and Agreement of Merger with [REDACTED]. Pursuant to the Plan and Agreement of Merger, [REDACTED] merged with [REDACTED] and ceased to exist as a separate entity. [REDACTED] emerged as the surviving corporation. The effective date of the merger was [REDACTED].

On [REDACTED], prior to the effective date of the merger, [REDACTED] executed a Form SS-10 with respect to its employment tax liabilities for the taxable years [REDACTED] through [REDACTED], extending the statute of limitations on assessment through [REDACTED]. Subsequently, on [REDACTED], after the effective date of the merger, [REDACTED] executed a Form SS-10 with respect to its employment tax liabilities for the taxable years [REDACTED] through [REDACTED], extending the statute of limitations on assessment from [REDACTED] to [REDACTED]. This consent, as currently captioned, is in the name of " [REDACTED] "

██████████." Both Forms SS-10 were executed on behalf of
██████████ by ██████████, ██████████
██████████ and ██████████.

██████████ was previously the ██████████ and ██████████
██████████ of ██████████. ██████████ is currently the ██████████
██████████ and ██████████ of ██████████.

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

1. Which entity is the proper entity to execute a Form SS-10 on behalf of ██████████ for the pre-merger tax years?

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

Unlike the income tax liability of a consolidated group, where, as a general rule, the common parent acts as sole agent for each member of the group, each member of a consolidated group must act on its own behalf with respect its own employment tax liabilities. See I.R.C. § 1501 and the regulations thereunder. Each member is, therefore, responsible for entering into its own consent to extend the statute of limitations with respect to its employment tax liabilities. In the case of a merged corporation,

the surviving or resulting corporation in a merger under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 499; See also Popular Library Inc. v. Commissioner, 39 T.C. 1092 (1963); Union Bleachery v. Commissioner, 97 F.2d 226 (4th Cir. 1938).

In the subject case, [REDACTED] is a New York corporation, and [REDACTED] is a Delaware corporation. These two corporations merged in accordance with the corporation laws of New York and Delaware. Pursuant to the law of New York, once a merger is effected, "[t]he surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities." N.Y. Bus. Corp. L. § 906(b)(3)(Consol. 1999). Similarly, pursuant to the law of Delaware, "when any merger or consolidation shall have become effective ... all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." Del. Code Ann., Title VIII, § 259(a) (1998).

The Form SS-10 extending the statute of limitations on assessment for [REDACTED] through [REDACTED] employment tax liabilities through [REDACTED], is captioned in the name of "[REDACTED]." It was signed on [REDACTED] in the name of [REDACTED], after the effective date of the merger between [REDACTED] and [REDACTED]. The consent was, therefore, captioned in the name of an entity that no longer existed and was signed in the name of an entity that no longer existed. Under the state laws of New York and Delaware, [REDACTED] became liable for the liabilities of [REDACTED], at the time of the merger, including [REDACTED] pre-merger employment tax liabilities. [REDACTED] was, therefore, the proper entity to execute the Form SS-10 to extend the statute of limitations with respect to [REDACTED] through [REDACTED] pre-merger employment tax liabilities.

2. What specific language should be used on the Form SS-10 for [REDACTED], for the pre-merger tax years?

Although an improperly captioned consent for [REDACTED] though [REDACTED] employment tax liabilities has already been executed, we have the opportunity to rectify this clerical error since the statute of limitations with respect to assessment of the employment tax liabilities does not expire until [REDACTED]. Accordingly, the caption of the Form SS-10 extending the statute of limitations through [REDACTED], for [REDACTED]

██████ pre-merger employment tax liability for taxable years ██████ through ██████ should read as follows:

"████████████████████ (E.I.N. ██████), as
successor in interest to ████████████████████
(E.I.N. ██████)."

The E.I.N. of ████████████████████ (E.I.N. ██████) should be entered in the upper right hand corner of the Form SS-10.

3. What specific language should be used on the Form
2504 (Revenue Agent Report) and the Closing Agreement
for ████████████████████?

Rev. Proc. 68-16 § 6.04 addresses the identification of parties in closing agreements. Section 6.04 provides, "The names of all taxpayer parties to the closing agreement should be accurately set forth at the beginning of the agreement and in the signature thereto." Section 6.04 also provides, "The taxpayer identifying number should ordinarily be shown at the beginning of the agreement."

Accordingly, our office concurs with your use of the language set forth above in issue 2 in the first paragraph of the closing agreement.

Similarly, with respect to the Form 2504, our office concurs with your use of the language set forth above in issue 2.

Should you have any questions regarding this matter, please contact Robin L. Peacock or Larry Davidow at (212) 264-1595.

LINDA R. DETTERY
District Counsel

By: _____
PETER J. LABELLE
Assistant District Counsel

Noted:

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